

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
GRANTED BY PIERCE COUNTY TO
JOHN MARSHALL, FRANK PUPO,
GORDON ERICKSON, and C. NEIL
LINDSTROM,

CONSTANCE and WALTER NORTHEY,

Appellants,

v.

PIERCE COUNTY, JOHN MARSHALL,
FRANK PUPO, GORDON ERICKSON,
and C. NEIL LINDSTROM,

Respondents.

SHB No. 84-6

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a shoreline substantial development permit granted by Pierce County to John Marshall, et al., came on for hearing before the Shorelines Hearings Board, Gayle Rothrock, Lawrence J. Faulk, Rodney Kerslake, Nancy R. Burnett, and A. M. O'Meara, convened at Gig Harbor, Washington, on June 15, 1984. Administrative Appeals Judge William A. Harrison presided.

1 Appellant Constance Northey appeared and represented herself.
2 Respondent John Marshall, et al., appeared by their attorney George F.
3 Marsico. Respondent Pierce County appeared by Robin Jenkinson, Deputy
4 Prosecuting Attorney. Reporter Marcia Erwin recorded the proceedings.

5 Witnesses were sworn and testified. Exhibits were examined. From
6 testimony heard and exhibits examined, the Shorelines Hearings Board
7 makes these

8 FINDINGS OF FACT

9 I

10 This matter arises on Gig Harbor in Pierce County.

11 II

12 Gig Harbor is a natural refuge for small boats. There are many
13 docks and moorages within it.

14 I.

15 The site in question is opposite (across the bay from) the Town of
16 Gig Harbor. The adjacent waterfront ownership near the site consists
17 of (a) a public boat launch, (b) the residence of appellants Northey,
18 and (c) the residences of respondents Marshall, Pupo, Lindstrom, and
19 Erickson. These respondents have agreed to share a joint-use dock for
20 moorage of their pleasure craft. They presently own six pleasure
21 craft from 15 to 32 feet in length with draft from eight inches to
22 four feet.

23 IV

24 Respondents Marshall and the others own a combined 400 feet of
25 waterfront. There is a common bulkhead across their four lots. It is

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1 approximately 150 feet from their bulkhead to the line of mean lower
2 low water. A dock 150 feet long would be unusable for moorage.
3 Dredging to provide moorage at a 150-foot dock would be both extensive
4 and likely to fail or require constant maintenance.

5 V

6 The development proposed by Marshall and the others consists of a
7 dock and float 200 feet long. This length, combined with dredging of
8 920 cubic yards would provide a six-foot depth beneath the final 50
9 feet of the float. The final 50 feet of the float would be "U" shaped
10 to provide four moorage spaces, one for each applicant. The proposed
11 development would be built at bulkhead level for its initial 32 feet,
12 then rest on the tidelands or float for the remaining 168 feet. It
13 would be no more than minimal height over this 168-foot portion,
14 excepting 7 piling.

15 VI

16 On February 17, 1983, respondents Marshall and the others applied
17 to Pierce County for a shoreline substantial development permit.
18 Pierce County issued a proposed declaration of non-significance under
19 the State Environmental Policy Act. This was reviewed by the State
20 Department of Fisheries which made no adverse comment except that
21 dredging should not occur from March 15 to June 15 to protect juvenile
22 salmon. Pierce County then entered a final declaration of
23 non-significance.

24 VII

25 Appellants Northey view the opposite shore of Gig Harbor from
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1 their residence. Their lateral view, towards the opening of the bay,
2 would include the proposed joint-use dock, float and moored pleasure
3 craft. The presence of the proposed development would not unduly
4 impair their view.

5 VIII

6 The shoreline in question is traversed by fishermen and wind
7 surfers. The proposed development would not substantially interfere
8 with navigation by those users of the bay; neither would the proposed
9 development substantially interfere with access to the nearby public
10 boat launch. The boat launch is some 300 feet from the proposed
11 development. The distance from the proposed development to the
12 opposing shore is approximately 1,5 feet. Most of this distance
13 would remain available to those navigating from the boat launch into
14 the bay, or out of the bay, and the same on return.

15 IX

16 The proposed development is in the rural-residential environment
17 under the Pierce County Shoreline Master Program (PCSMP).

18 X

19 The PCSMP provides, with regard to joint-use docks:

20 Intent. It is the intent of Pierce County to
21 encourage the construction of joint use or community
22 docks and piers whenever feasible so as to lessen the
23 number of structures projecting into the water. To
24 this end, waterfront property owners are encouraged
25 to explore the advantages of increased dock
26 dimensions which are afforded by the construction of
27 a joint or community use structure. PCSMP Section
65.56.020, page 56-2.

XI

The PCSMP provides, with regard to piers and docks:

B. Development Guidelines - In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project application for Substantial Development Permit in arriving at a satisfactory degree of consistency with the policies and criteria set forth in this Chapter. To this end the County may extend, restrict or deny an application to achieve said purposes. PCSMP Section 65.56.040B, page 56-5.

Among these guidelines is:

7. Joint use piers and docks.

- a. Maximum intrusion into water should be only so long as to obtain a depth of eight feet of water as measured at mean lower low water on saltwater shorelines, or as measured at ordinary high water on fresh water shorelines, except that the intrusion into water of any pier or dock should not exceed the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines and 40 feet on fresh water shorelines.
- b. Maximum length parallel to shore shall be as determined by the appropriate reviewing authority.
- c. Minimum separation between the structure and the side property lines extended at a right angle to the shoreline of any property not sharing in the use of the structure shall be as required by the appropriate reviewing authority.
- d. Joint use piers and docks can be located on, or straddling the property line of adjacent waterfront property owners when mutually agreed to be the owners in a contract, a copy of which must be filed with the application for permit.

- 1 e. Joint dock facilities should have no more
2 moorage spaces than one space per waterfront
owner using the dock.

3 PCSMP Section 65.56.0403.7., page 56-6.
4 (Emphasis added.)

5 XII

6 The PCSMP provides, with regard to dredging:

7 ENVIRONMENT REGULATIONS - USES PERMITTED.

8 A. Urban, Rural-Residential and Rural Environments.

9 1. Uses permitted subject to the general
regulations:

10 a. Dredging and disposal of dredged
material.

11 PCSMP Section 65.32.020, page 32-2,
12 (emphasis added).

13 The general regulations for dredging :

14 GENERAL REGULATIONS. The following regulations
15 apply to dredging activities in all marine
environments.

- 16 A. Dredging material which will not cause violation
of State Water Quality Standards may be used in
permitted landfill projects.
- 17 B. Where regular navigation maintenance dredging is
18 required, a long-range plan for disposal sites
shall be filed with the Planning Department.
- 19 C. Deep-water spoil disposal shall be done only at
20 approved disposal sites and only when material
meets EPA criteria for deposit in open waters.
- 21 D. When upland disposal and storage sites are
22 selected, consideration shall be given to the
effect on wildlife habitat, such site may be
23 approved after consultation with the appropriate
24 state agency/agencies. (Amended Res. #19803,
June 14, 1977)

1 E. Disposal sites shall be protected as necessary by
2 berms and outlets to remove suspended solids and
3 insure that the quality of return water meets
4 State Department of Ecology standards.

5 F. Disposal of dredged material on marshes, swamps
6 or bogs is prohibited except in committed
7 industrial areas having an adopted comprehensive
8 plan. (Amended Res. #19803, June 14, 1977)

9 G. Gravel removal within the high water flow channel
10 bed on rivers and streams shall be permitted for
11 habitat improvement as requested by the
12 Departments of Fisheries and Game, and for
13 permitted structural installations.

14 H. Removal of gravel from the high water flow
15 channel bed for flood prevention purposes shall
16 be permitted. Sand and gravel shall not be
17 removed for the sole purpose of obtaining the
18 materials. (Amended Res. #19803, June 14, 1977)

19 PCSMP Section 65.32.020, page 32-1.

20 XIII

21 The PCSMP provides with regard to buoys:

22 Uses permitted outright:...

23 b. Anchor buoys limited to one per lot owner or one
24 per 100 feet of shoreline frontage.

25 PCSMP Section 65.56.030A.1.b. and -030B, page
26 36-3 and 4.

27 XIV

On February 14, 1984, Pierce County conditionally approved the
proposed development by granting a substantial development permit
which affirmed the decision of the Pierce County Hearing Examiner.
That permit contains the following conditions:

DEVELOPMENT PURSUANT TO THIS PERMIT SHALL BE
UNDERTAKEN PURSUANT TO THE FOLLOWING TERMS AND
CONDITIONS:

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1 While recognizing that the rights of the adjacent
2 property owners should be preserved and protected to
3 some extent, and while still allowing the applicants
4 to have a reasonable use and enjoyment of their
5 property, the Examiner might offer one proposed
6 solution and that would be to place the pier at 150
7 ft., recognizing of course that the first 36 ft. are
8 permanent with the balance floating, and then to
9 provide a 50 ft. extension beyond that. This
10 extension should be removable in order to allow a
11 trial basis and thereby determine in fact what the
12 interference with the water use and/or the views of
13 the adjacent property owners, the Northleys, would
14 be. This trial period would be for a period of 3
15 months, after which there would be further hearing
16 before the Examiner as to whether or not the dock
17 should remain with its 50 ft. extension. If this is
18 agreeable with the applicant, then the Examiner would
19 allow the decision to be amended to provide for this
20 temporary extension for a trial period of 3 months.

21 Applicants shall sign a Memorandum of Agreement with
22 the conditions contained in the Examiner's approval
23 and file this document with the Auditor.

24 Applicants shall comply with all requirements of
25 other permit issuing agencies.

26 The existing floats as related with the applicants'
27 homes shall be removed.

Applicants shall adhere to the following requirements
and standards of Chapter 65.00.040 B - Development of
Guidelines Nos. 3, 4, 5, 7a-e, 10.

The dock shall be a floating dock only.

XV

Although the form of the permit has created confusion as to
whether dredging would be allowed during the three-month test, we find
that dredging is so allowed by the permit. We note, in this regard,
the letter of October 12, 1963, from the Pierce County Hearing
Examiner to appellant's counsel in which he states:

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1 If some dredging is required in support of this use
2 for the three month period of time, then that
3 dredging is also deemed to be approved.

4 Were dredging not approved and carried out, the boats could not be
5 moored at the proposed dock.

6 XVI

7 Appellants Northey filed their request for review before this
8 Board on February 21, 1984. Respondents Marshall and others raised an
9 issue as to the propriety of the test condition included in the permit
10 and requested the Board to strike the test condition but otherwise
11 affirm the permit. The basis for the request to strike the test
12 condition related to respondents' assertion that first, it was
13 impractical from a financial standpoint to proceed with the necessary
14 dredging for the dock without having any assurances that the 200 foot
15 dock length would be permitted and second, the apparent purpose of the
16 test; i.e., to determine the effect of a 200 foot vis a vis a 150 foot
17 dock, particularly in terms of view blockage, could not be achieved
18 since it would be impractical, for a three month test, to secure the
19 floating portions of the dock with piling and instead an anchor system
20 would have to be utilized which would not sufficiently secure the
21 floating dock sections to allow larger boats to be moored at the
22 dock. Such boats would constitute the major view interference
23 occasioned by the proposed dock facility since the floating portion of
24 the dock would only be approximately one foot above the surface of the
25 water.

XVII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Appellants, having requested review, bear the burden of proof in this proceeding. RCW 90.58.140(7).

II

We review the proposed development for consistency with the applicable (Pierce County) shoreline master program and the Shoreline Management Act (SMA). RCW 90.58.140.

III

The proposed development is consistent with the intent of the Pierce County Shoreline Master Program (PCSMP) preferring joint-use docks. PCSMP Section 65.56.020, page 56-2.

IV

Pierce County has adopted a master program provision for docks which is permissive rather than mandatory; that is, "...the intrusion into water should not exceed...150 feet." PCSMP 65.56.040B.7., page 56-6. Despite this, we conclude that special circumstances must exist which render a 150-foot dock impractical, and that a longer dock must have no significant additional adverse effect before any longer dock can be allowed under this provision.

V

Special circumstances exist in this case because a 150-foot dock would barely reach the water's edge at mean lower low water. Hence, it would be a landing place at high tides but not a practical moorage. Such a dock, permitted outright by PCSMP 65.56.040B.7., page 56-6, would necessitate the use of buoys for moorage. Each of the four applicants could maintain a separate anchor buoy under PCSMP Section 65.56.030A.1.b. and -030B, page 56-3 and -4 (see Findings of Fact XI and XII, above).

VI

The proposed 200-foot dock has not been proven to have significantly more adverse effect upon view, navigation or public recreation than a 150-foot dock with four anchor buoys.

VII

Appellants have not proven, on this record, that the proposed dredging would have a harmful effect. Dredging, as proposed, is a permitted use under PCSMP Section 65.32.020 and .030, pages 32-1 and -2.

VIII

The test condition imposed by Pierce County to determine whether or not substantially greater impacts would result from a 200 foot long dock as opposed to a dock 150 feet in length certainly is meritorious; however, in light of the evidence before us, the three-month trial period, included as a condition to the permit, is impractical to implement and would not accomplish its intended purpose and,

1 therefore, should be stricken. A condition should be added forbiddin
2 the use of anchor buoys at the residences involved in the
3 application. This action is necessary to conform the proposed
4 development to the cited provisions of the PCSMP and the SMA.

5 IX

6 Any Finding of Fact which is deemed a Conclusion of Law is hereby
7 adopted as such.

8 From these Conclusions of the Law the Board enters this
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ORDER

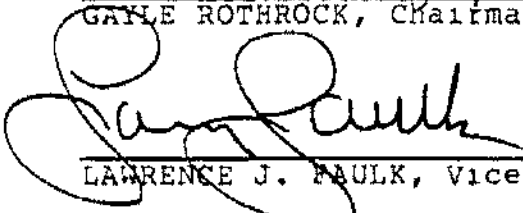
The shoreline substantial development permit granted by Pierce County to Marshall and others is reversed to the extent necessary to conform it to Conclusion of Law VIII, above. The permit is affirmed in all other respects. This matter is remanded to Pierce County for reissuance of the permit consistent with this Order.

DONE at Lacey, Washington, this 9th day of August, 1984.

SHORELINES HEARINGS BOARD

see dissenting opinion

GAYLE ROTHROCK, Chairman


LAWRENCE J. FAULK, Vice Chairman


RODNEY KERSLAKE, Member


NANCY R. BURNETT, Member


A. N. O'HEARA, Member


WILLIAM A. HARRISON
Administrative Appeals Judge

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1 DISSENTING OPINION - ROTHROCK

2
3 I disagree with the majority in ordering the reissuance of the
4 subject substantial development permit with only the alterations cited
5 in Conclusion of Law VIII. I would remand the permit to Pierce County
6 for review of the permit application for a 200-foot, U-shaped, joint
7 use dock under Conditional Use criteria, or alternately, vacate the
8 permit.

9 Appellants represented that a 200-foot dock with a horseshoe-shaped
10 boat tie-up area, which requires dredging 920 cubic yards of
11 intertidal and subtidal material to construct, is the size of dock
12 they find possible to use; that a 150-foot dock or another design is
13 not what they desire. They asked the Pierce County Hearing Examiner
14 who, at first, approved a 150-foot dock, to reconsider since such a
15 mooring structure would not be usable.

16 The PCSMP, at 65.56.040(B)(7)(a) provides that intrusion into the
17 water of any joint-use pier or dock "...should not exceed the lesser
18 of 15 percent of the fetch or 150 feet on salt water shorelines...".
19 This serves as a length limit which should be upheld unless a dock
20 project can pass the tests of conditional use criteria. Otherwise,
21 there is no good basis for determining whether a longer dock is
22 allowable and in the public interest. The hearing examiner's
23 struggle, under his first reconsideration, to articulate a reasonable
24 solution resulted in an unworkable three-month test period because he
25 had no real use regulations available to employ in determining a

1 result under such a request for reconsideration.

2 The requirements in the SMA at RCW 90.58.020 and in the PCSMP at
3 65.56.040(A) to have permitted projects be consistent with the
4 policies of the Act and of the PCSMP are not met. They are more
5 generalized criteria and become the only ones available to a permit
6 reviewer in any joint-use dock application in Pierce County, unless
7 conditional use is acknowledged to be a necessary part of the review.
8 Here the project does impair views of the Narrows and parts of the
9 Harbor, does interfere with the public's use of and access to surface
10 waters (particularly fishing, canoeing, and windsurfing), and ample
11 adequate moorage and public launching facilities exist. A dock
12 exceeding 150 feet in length as set forth in the record made in this
13 case fails these policy consistency tests.

14 While Gig Harbor is known for its boat havens and ample moorage
15 (buoys, marinas, docks), there is nothing in that reputation
16 compelling a stretching of or experimenting with the PCSMP and the SMA
17 to entertain, only under substantial development permit review, an
18 oversize dock on a gently sloping intertidal area when there are so
19 many satisfactory and easily available alternatives and so many
20 potential adverse impacts.

21
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23 
24 GAYLE ROTHROCK, Chairman

25
26 DISSENTING OPINION
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